

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GARY D. ELLIOTT</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,902
<b>ARNALL DRYWALL</b>	)	
Respondent	)	
AND	)	
	)	
<b>AMERICAN FAMILY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) appealed the September 29, 2008, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

Claimant alleges he injured his low back, neck, left shoulder and arm each day he worked for respondent commencing November 12 or 21, 2005.<sup>1</sup> Claimant did not testify when he stopped working for respondent. And that date is not otherwise indicated in the record.

In the preliminary hearing Order, Judge Hursh granted claimant's request for temporary total disability benefits. The Judge reasoned, in part:

The ten pound restriction and the claimant's work history since the injury demonstrate that the claimant is not capable of substantial gainful employment. The claimant remains under active medical treatment for the effects of the work

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<sup>1</sup> Claimant's application for hearing alleges he injured himself each and every working day beginning November 21, 2005, and ending his last date worked. But the preliminary hearing transcript at page 9 indicates the period of accident being alleged was each and every working day beginning November 12, 2005, and ending his last day worked.

injury. The claimant's inability to engage in employment is considered temporary while he is subject to active treatment. . . .<sup>2</sup>

Respondent contends Judge Hursh erred and the Order should be reversed. Respondent argues claimant is not entitled to receive temporary total disability benefits because he does not have any temporary restrictions and he is capable of performing substantial and gainful employment. In short, respondent argues claimant does not satisfy the definition of being temporarily and totally disabled.

Claimant, however, argues this appeal should be dismissed because respondent has failed to raise a preliminary hearing issue that may be reviewed at this juncture of the claim. In the alternative, claimant argues the Order should be affirmed.

Accordingly, the issues before the Board on this appeal are:

1. Does the Board have jurisdiction under K.S.A. 44-534a to review at this juncture the issue of whether claimant meets the definition of being temporarily and totally disabled?
2. If so, did claimant satisfy his burden of proof?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the record compiled to date, the undersigned finds and concludes:

This is an appeal from a preliminary hearing order. The issue raised by respondent is not subject to review at this stage of the proceedings.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2007 Supp. 44-551. This includes review of the specific preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>3</sup>

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<sup>2</sup> ALJ Order (Sept. 29, 2008) at 1.

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a. Moreover, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an administrative law judge has the jurisdiction to determine at the preliminary hearing stage of a claim.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.<sup>5</sup>

This review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the Board dismisses this appeal, which leaves the September 29, 2008, Order entered by Judge Hursh in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2008.

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KENTON D. WIRTH  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge

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<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>5</sup> K.S.A. 44-534a.